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### A moment to mark

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*Published in:*

Revista de investigacoes constitucionais-Journal of constitutional research

*DOI:*

[10.5380/rinc.v5i3.64065](https://doi.org/10.5380/rinc.v5i3.64065)

**IMPORTANT NOTE:** You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

*Document Version*

Publisher's PDF, also known as Version of record

*Publication date:*

2018

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Albert, R., Ranchordas, S., & Rivera, M. V. (2018). A moment to mark: the Brazilian Constitution turns 30. *Revista de investigacoes constitucionais-Journal of constitutional research*, 5(3), 12-16.  
<https://doi.org/10.5380/rinc.v5i3.64065>

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# REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

**JOURNAL OF CONSTITUTIONAL RESEARCH**

vol. 5 | n. 3 | setembro/dezembro 2018 | ISSN 2359-5639 | Periodicidade quadrimestral

Curitiba | Núcleo de Investigações Constitucionais da UFPR | [www.ninc.com.br](http://www.ninc.com.br)

# Introduction

## Introdução

Revista de Investigações Constitucionais

ISSN 2359-5639

DOI: 10.5380/rinc.v5i3.64065

### A moment to mark: the Brazilian Constitution turns 30

#### *Um momento para marcar: a Constituição brasileira completa 30 anos*

The year 2018 is a significant milestone for the Brazilian Constitution: thirty years since its enactment – and since the country embarked on its new beginning after two decades of civil-military dictatorship. The country has achieved much in its relentless efforts to build a strong constitutional democracy. And yet as the country marks this moment, it finds itself in the midst of great turmoil. Once known primarily as South America's tiger economy, Brazil is now associated in the global mind most closely with an increasingly polarized and at times dysfunctional political environment plagued by systemic corruption. Recent political crises – from the “Operação Lava Jato” corruption scandal,<sup>1</sup> to Dilma Rousseff's impeachment<sup>2</sup>, Lula's imprisonment and his failed attempt to run for the presidency from prison,<sup>3</sup> the assassination of the politician and human

<sup>1</sup> See e.g. WATTS, Jonathan. Operation Car Wash: The Biggest Corruption Scandal Ever?. **The Guardian**, 01 June 2017. Available at: <<https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>>. Accessed in 12 Sept. 2018; and SILVA, Marina. How Operation Car Wash Is Exposing Political Crime in Brazil. **The New York Times**, 18 Sept. 2017. Available at: <<https://www.nytimes.com/interactive/2017/admin/10000005437135.embedded.html?>>. Accessed on 12 Sept. 2018.

<sup>2</sup> ROMERO, Simon. Dilma Rousseff Is Ousted as Brazil's President in Impeachment Vote. **The New York Times**, 21 Dec. 2017. Available at: <<https://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html>>. Accessed in 12 Sept. 2018.

<sup>3</sup> PHILLIPS, Dom. Brazilian Court Bars Lula from Presidential Election. **The Guardian**, 01 Sept. 2018. Available at: <<https://www.theguardian.com/world/2018/sep/01/brazilian-court-bars-lula-from-presidential-election>>. Accessed on 12 Sept. 2018.

Como citar este editorial | *How to cite this editorial*: ALBERT, Richard; RANCHORDÁS, Sofia; VELASCO RIVERA, Mariana. Introduction – A moment to mark: the Brazilian Constitution turns 30. **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 3, p. 12-16, set./dez. 2018. DOI: 10.5380/rinc.v5i3.64065.

rights activist Marielle Franco,<sup>4</sup> and most recently to the stabbing of the presidential candidate Jair Bolsonaro<sup>5</sup> – have combined with long-standing social problems such as poverty and economic inequality to test both the branches of government and the Brazilian people across the political spectrum like never before since 1988.

The contemporary constitutional history of Brazil is proof of the complexity involved, and often also of the pain, in building a constitutional democracy. It shows that democracy-building, like politics, is not a linear process,<sup>6</sup> and most importantly that it entails failure, challenge, achievement and constant struggle. There is an important lesson to draw from the Brazilian case in our study of democratization: true understanding of political and constitutional realities different from our own requires attention both to text and context, and demands tireless effort and sustained commitment to the enterprise. Only then may we hope to better locate the experience of others in the great sweep of lived constitutionalism, and in turn to offer better and more nuanced comparative accounts.

The papers in this special issue of the *Revista de Investigações Constitucionais* – *Journal of Constitutional Research* seek to offer a snapshot, from a global perspective, not only of failures and challenges but also the achievements of the Brazilian constitutional project of 1988. We hope the analysis of the Brazilian constitutional reality from these points of view may usefully contribute to the difficult task of forging a realistic path forward to meeting Brazil's most pressing needs.

This special issue includes a number of different contributions that delve into three key constitutional topics: constitutional legitimacy, the role of the Brazilian judiciary in the enforcement of social rights, and the transformation of political institutions.

A first set of articles explores the past and present of the Brazilian Constitution by explaining from a comparative perspective how the past has dictated its development. In their co-authored article, Fernando José Gonçalves Acunha, Mohamed A. 'Arafa and Juliano Zaiden Benvindo explain several modern constitutional problems in light of so-called 'ancient ghosts'. A comparison with Egypt shows how the transition from a military dictatorship to a democracy could have produced different results for Brazil.

A similar analysis appears in the article co-authored by Santiago García-Jaramillo and Camilo Valdivieso-León, though their comparator is Colombia. They highlight that reforming political institutions both in Brazil and in Colombia implicates rethinking

<sup>4</sup> PHILLIPS, Dom. Marielle Franco: Brazil's Favelas Mourn the Death of a Champion. **The Guardian**, 18 Mar. 2018 <<https://www.theguardian.com/world/2018/mar/18/marielle-franco-brazil-favelas-mourn-death-champion>>. Accessed on 12 Sept. 2018.

<sup>5</sup> LONDOÑO, Ernesto; DARLINGTON, Shasta. Jair Bolsonaro, Presidential Candidate in Brazil, Is Stabbed. **The New York Times**, 07 Sept. 2018. <<https://www.nytimes.com/2018/09/06/world/americas/brazil-jair-bolsonaro.html>>. Accessed on 12 Sept. 2018.

<sup>6</sup> See BALKIN, Jack M. Constitutional Crisis and Constitutional Rot. **Maryland Law Review**, Baltimore, vol. 77, n. 1, p. 147-160, Nov. 2017.

the role and the boundaries of the judiciary in the transformation of constitutionalism. Not surprisingly, a number of articles in this special issue follow this lead and explore the role of the Brazilian judiciary in the interpretation of the 1988 Constitution. To illustrate, the activist contribution of the Brazilian Supreme Court to constitutional change is theorized by Valentina Scotti who explains the importance of “cláusulas pétreas” in the evolution of Brazilian constitutionalism. Andrea Katz draws from a true Brazilian “novela”: the “Operação Lava Jato” that exposed the deep entrenchment of corruption in the country and the role of courts and prosecutors in trying to dismantle it.

The thirty years of the 1988 Brazilian Constitution can only be understood in light of the evolving social, economic, and political changes. Alba Ramos Escobar examines the incorporation of peace as a concept in the Brazilian Constitution, arguing its constitutionalization has raised as-yet unresolved questions and challenges. Pablo Contreras and Domingo Lovera underline the importance of non-legal elements, namely geopolitical factors, to the Brazilian Constitution. Arturo Alvarado’s article provides a balanced perspective of the good and the bad in societal change in the life of the Constitution. He also underlines one of Brazil’s most pregnant problems: the distance between formal entitlements and the real access to social rights. This article ties in quite well with Evan Rosevear’s article in which he compares the interpretation of social rights in Brazil and South Africa, with a particular focus on the development of the right to health. Although at first Brazilian courts were reluctant to grant social rights claims, Rosevear explains how case law evolved and the Brazilian judiciary started treating social rights as guarantees owed by the state to specific individuals. The non-fulfilment of these guarantees has been remedied by individual litigation requiring the state to provide access to specific medicines. South Africa offers an informative contrast because its courts have decided similar claims on the right to health and housing by adopting an administrative law approach focused on the “reasonableness” of government policy in specific contexts.

The role of the Brazilian Supreme Court in the constitutionalization of rights is the focus also of Marta Rodriguez de Assis Machado and Rebecca Cook. They reflect in their contribution on the evolution of the right to abortion and the innovative perspective of the Supreme Court that, in the last decade, has reshaped criminal law to give Brazilian women the right to terminate an unwanted pregnancy. The importance of Brazilian courts in the enforcement of social rights is explored further in Francisca Pou Giménez’s article in which she contrasts the activism of the Brazilian Supreme Court with the “contained public profile” of the Mexican Supreme Court. “Two constitutional giants”, as she calls them, with much less in common that one would expect. Her comparative article provides a less critical analysis of Brazilian constitutionalism than other articles in this special issue: the first thirty years of the Brazil Constitution are presented as a narrative of hope and constitutional appropriation by its people and political

actors. Citizens turned to courts to claim rights in times of need and, in the case of the right to health, they were given an answer. She argues that in Mexico, however, one hundred years has left the constitution in a state of “solitude”, given the limited output legitimacy that the Mexican constitution still suffers from.

Brazil will mark the 30th anniversary of its modern constitution with reflection, criticism and celebration. Some will contend the constitution has failed to satisfy the country’s needs, others will reason that on balance the constitution has brought more or less stability and success than would have been possible without it, and still others will boast of the constitution’s achievements for a country that has become a regional leader and a global power.

All three sentiments are appropriate on this occasion. And all three should be heard. It would do a disservice to the country if the only views aired in this moment were celebratory ones. The truth is that constitutions, for all one might say about their capacity to mold disparate peoples into a nation, always fall short of our highest ideals. They promise rights but often fail to deliver, they separate powers on paper but in reality one branch or another dominates over the others, and they purport to speak in the name of the people but many if not most are excluded from the project of self-government that constitutions envision. And yet the democratic impetus to codify a constitution overwhelms our knowledge of the inevitability that there will be a gulf between its text and our lived experience under it.

We have chosen to commemorate the 30th anniversary of the Brazilian Constitution in this forum – featuring voices new and established, local and external, spanning the spectrum of public law – for three reasons.

First, we think it is important to offer a dispassionate assessment of the Constitution at this critical juncture in its history, already more than ten years older than the average constitution’s lifespan of 19 years. The scholars we have gathered in this special issue come from different parts of the globe, with different views on constitutional functions and goods, and together their evaluation of the Brazilian Constitution offer an invaluable cross-section of informed views on this important institution.

Second, we are scholars of public law who believe strongly that occasions like these are unique opportunities for learning and teaching. Anniversary specials focus our attention on our shared and dissimilar values, aspirations, and visions for our state and the world. Even as we explore the specificities of the Brazilian Constitution, we learn about our own constitutional systems, about their relative strengths and shortcomings, about their comparative standing on important indicators of democratic. Wherever we end up – believing that the Brazilian Constitution fares better than ours, or that our own system has much to impart to Brazil – the victory will have been in our close engagement with another jurisdiction about which we might not have known much before.

And, third, our choice to commemorate this anniversary is driven by the realities of the global currents of law. Our world is growing smaller as intellectual exchange across borders is becoming increasingly more porous and as ideas migrate from one jurisdiction to another. Greater accessibility to other jurisdictions is a hallmark of our current time, as is a heightened awareness of the myriad ways we are connected to each other by the forces of globalization. We take for granted in organizing this special issue that there is interest outside of Brazil to learn about the country's constitution, and also that Brazilians themselves are eager to know what those beyond their borders think of their constitution. The proof is already visible in the many scholars from around the world who have written fascinating papers on the Brazilian Constitution in an effort to deepen their own engagement with the country's many peoples and institutions.

We are grateful to Daniel Wunder Hachem, Editor-in-Chief of this Journal, for giving us the opportunity to organize what we hope will be for readers an important resource to learn about the Brazilian Constitution in comparative perspective as it marks its 30th anniversary.

September, 2018.

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